UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER,

Plaintiff,

vs.

HARRAH'S ENTERTAINMENT, INC.,

Defendant.

Case No. 07cv2226, consolidated with Master CASE NO. 07CV2132

ORDER DENYING DEFENDANT'S MOTION TO DECLARE PLAINTIFF A VEXATIOUS LITIGANT

[Doc. 42, 56, 63]

Pending before the Court is Defendant Harrah's Entertainment's motion to declare Plaintiff a vexatious litigant. The issues were briefed by the parties and submitted for consideration without oral argument on April 21, 2008. The motion is denied for the reasons set forth below.

I.

BACKGROUND

Plaintiff's Amended Complaint alleges violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"), and California law. The TCPA prohibits making any call using an automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a paging service, cellular telephone service, or any other service for which the party is charged for the call. 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiff alleges Defendant violated the TCPA by

calling his (619) 999-9999 telephone number, which is assigned to a paging service, through use of an artificial or prerecorded voice, without Plaintiff's express permission.[1]

Defendant contends Plaintiff obtained a phone number that disproportionately attracts automatically-dialed telephone calls. (Reply at 1). Plaintiff neither admits nor denies this contention, but concedes that he has filed hundreds of repetitive, substantively identical lawsuits against entities that call the 999 Number. Many such lawsuits allege fewer than nine violations, and each lawsuit prays for a statutory award of $500 per violation. (*See, e.g.* Exh. 3-14). Between 2000 and 2007, Plaintiff filed more than 350 such cases in California state courts. In 2007, Plaintiff filed 150 such cases, and at least 27 cases were filed in December 2007 alone. He was declared a vexatious litigant by the State of California, and was listed on the Vexatious Litigant List prepared and maintained by the Administrative Office of the Courts for the State of California for September and October 2007 (when the instant lawsuit was filed) and remained on the list as recently as January 2008. His presence on California's Vexatious Litigant List requires him to obtain a pre-filing order before filing future claims in state court, and makes him subject to the requirement that he post a bond.

Plaintiff filed the present action in the San Diego County Superior Court, and Defendant thereafter removed the action to this Court based on diversity jurisdiction. Defendant now seeks to have Plaintiff declared a vexatious litigant in the Southern District of California.

II.

DISCUSSION

"The All Writs Act, 28 U.S.C. § 1651(a), provides district courts with the inherent power to enter pre-filing orders against vexatious litigants. *Molski v. Evergreen Dynasty Corp*, 500 F.3d 1047, 1056 (9th Cir. 2007), *rehearing en banc denied* 2008 U.S. App. LEXIS 7372 (April 7, 2008). Because such orders can "tread on a litigant's due process right of access to the courts," they are an "extreme remedy that should rarely be used." *Id.* Before declaring a plaintiff a vexatious litigant, the Court must examine four factors. *Id.* at 1057. "First, the litigant must be given notice and a chance to be heard before the order is entered. Second, the district court must compile an adequate record for review.

[1] Plaintiff has five other actions involving similar allegations against other defendants currently pending in this District. Plaintiff also names five other "Harrah's" defendants in related actions. All of these actions have been consolidated under Case No. 07CV2132.

Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation. Finally, the vexatious litigant order must be narrowly tailored to closely fit the specific vice encountered." *Id.* (citations omitted).

Of these four factors, the third factor – concerning the frivolous or harassing nature of the litigation – is central to the vexatious litigant analysis. *See Molski*, 500 F.3d at 1059 (third factor "gets to the heart of the vexatious litigant analysis") (citations omitted). Defendant argues Plaintiff's litigation in federal court is frivolous and harassing for the following reasons: (1) he has been designated a vexatious litigant in California state court, where he is subject to a pre-filing order, and several times has been denied permission to file his claims; (2) he has filed many substantively identical claims against many defendants; (3) his pattern of alleging only a small number of violations indicates an intent to extort a settlement rather than litigate a series of small cases (Mot. at 4, 9-10); and (4) he intentionally requested the 999 Number to attract violations of the TCPA so he could litigate these claims for profit. These arguments are addressed in turn.

A. Plaintiff's State Court Litigation.

First, Defendant urges the Court to consider Plaintiff's long history of litigation in California courts and his status as a vexatious litigant in state court. One's status as a vexatious litigant in state court, however, is irrelevant to the vexatious litigant analysis in federal court. State courts are courts of general jurisdiction, while federal courts are courts of limited jurisdiction. This fundamental distinction between state and federal courts virtually eliminates any chance of Plaintiff becoming a vexatious litigant in federal court under the TCPA because that statute does not confer subject matter jurisdiction. *See Murphy v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000) (TCPA provides no private right of action in federal court). For that reason, all of Plaintiff's pending federal cases initially were filed by him in state court. A small handful of Plaintiff's cases (*nine* so far) found their way into federal court, but only after defendants removed them based upon diversity jurisdiction. Plaintiff has never shown any interest in gaining access to the federal courts, and in fact, has successfully moved to remand two of the referenced cases to state court when diversity jurisdiction was absent. (Case No. 07cv2091, Doc. 16; Case no. 07cv2274, Doc. 15).

Despite Defendant's request to the contrary, this Court cannot simply import a state court "vexatious litigant" label and apply it to a litigant in federal court. The California legislature "adopted the Vexatious Litigant Statute in 1963 to ease the 'unreasonable burden placed upon the [state] courts by groundless litigation.'" *Wolfe v. Strankman, et al.,* 392 F.3d 358 (9th Cir. 2004) (citing *Wolfgram v. Wells Fargo Bank*, 53 Cal.App.4th 43, 61 (1997)). The concern of the California legislature regarding the burdens placed on California state courts by groundless litigation, however legitimate, cannot be used against a litigant in a different court system. The federal and state courts are tasked with the responsibility of managing their own caseloads, under their own body of law.

California's definition of vexatious litigation, for example, is far more inclusive than the federal standard. Unlike the federal standard, the California standard does not require a finding that the challenged litigation is "patently without merit." *See Moy v. United States,* 906 F.2d 467, 470 (9th Cir. 1990). In California, a person is deemed a vexatious litigant if "in the immediately preceding seven-year period [he] has commenced, prosecuted, or maintained in propia persona at least five litigations other than in a small claims court that have been (I) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing." Cal. Civ. Proc. Code § 391(b)(1). Notably, even if California's vexatious litigant standard applied in federal court, which it does not, Defendant's motion still would fail as none of Plaintiff's lawsuits in the Southern District of California have been adjudicated against him. Because the cases have only been pending in this District since 2007, Plaintiff has developed no track record to speak of, let alone an adverse track record, in federal court.[2]

Finally, Defendant attaches as exhibits several orders by a California state court denying Plaintiff permission to file his TCPA claims. The orders uniformly deny permission based upon substantive deficiencies in the pleadings. As noted, the state court orders are irrelevant to a vexatious litigant analysis in federal court. Among other things, the state court pleading standards are different from the federal standards. Moreover, Defendant has not filed a motion attacking the substantive

[2] The absence of such record negates the second factor set forth in *Molski*, 500 F.3d at 1057 (district court, sitting in the Central District of California, compiled "an adequate record for review" where it considered approximately 400 cases filed by Molski in the Central District).

sufficiency of Plaintiff's pleadings, nor does it do so now.[3]

B. Plaintiff's Duplicative Lawsuits.

Second, Defendant argues Plaintiff's duplicative lawsuits should weigh in favor of declaring Plaintiff a vexatious litigant. In *Molski*, the plaintiff brought many hundreds of claims against restaurants and other small businesses under the Americans with Disabilities Act (ADA), each alleging similar accessibility-related violations. Although the court in *Molski* acknowledged plaintiff's "numerous suits were probably meritorious in part [as] many of the establishments he sued were likely not in compliance with the ADA," *Id.* at 1062, it held the district court did not abuse its discretion in declaring the plaintiff a vexatious litigant because plaintiff made "baseless and exaggerated claims of injuries" that "exceeded any legitimacy and were made for the purpose of coercing settlement." *Id.* at 1059-61 (noting district court found Molski "did not suffer the injuries he claimed" and "plainly lied"). Thus, *Molski* stands for the proposition that a "measured legitimate claim may cross the line into frivolous litigation by asserting facts that are grossly exaggerated or totally false." *Id.* at 1060-61.

But repetition of lawsuits under the TCPA does not, standing alone, suggest the claims are grossly exaggerated or totally false. In *Molski*, the court found that the assertion of many similar injury claims was not credible because they allegedly resulted from the plaintiff's repetitive interaction with the same or similar ADA violations occurring within days or hours of each other. *Id.* at 1059 ("[I]t is very unlikely that Molski suffered the same injuries, often multiple times in one day, performing the same activities – transferring himself from his wheelchair to the toilet or negotiating accessibility obstacles.") Here, Plaintiff's alleged damages are not based upon a claim of injury; rather, he seeks a statutory recovery of $500.00 for each violation of the TCPA, that is, his alleged damages are triggered simply upon receipt of certain statutorily-proscribed telephone calls in an amount authorized by the statute. Accordingly, Plaintiff's repeated statutory claim of damages does not suffer from the same credibility problems as the injury claims presented in *Molski*.

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[3] For the first time in its Reply, Defendant argues Plaintiff cannot prove Defendant made the phone calls at issue. (Reply at 5). However, this Defendant is merely one of six named defendants in one of six consolidated actions pending in this Court. Thus, the argument that Defendant did not make the calls, even if meritorious, at most raises questions about the merits of Plaintiff's case against this particular Defendant. While perhaps properly raised in a Rule 56 motion, this contention does not advance Defendant's argument that Plaintiff is a vexatious litigant in this District.

C. Plaintiff's Intent to Settle.

Third, Defendant argues Plaintiff's strategy of alleging only a few violations per complaint (and thus small damages) indicate an intent to extort settlement rather than litigate. As stated in *Molski*, even if a claim for damages is legally justified, the Court may find that Plaintiff is a vexatious litigant if his "litigation strategy evidence[s] an intent to harass businesses into cash settlements." *Id.* at 1060. The *Molski* court found this to be the case when the plaintiff wrongfully claimed damages that exceeded the statutory minimum, and were far in excess of the injuries he actually suffered. *Id.* at 1060 n.6 ("Because he claimed damages far in excess of his actual injuries, his exaggerated claims of damages support a pre-filing order to the extent that he sought to recover more than the statutory minimum of damages."). Here, Plaintiff claims only statutorily authorized damages for calls he attributes to Defendant. (Case No. 07cv2226, Doc. 10-4).

The Court recognizes that filing a series of small lawsuits can have a coercive effect: when small damages are at stake, even an innocent defendant may choose to settle rather than spend the money required to exonerate itself for principle's sake. The TCPA, however, specifies neither a threshold amount of damages nor a minimum number of violations that must occur before suit can be brought. Thus, in the absence of evidence indicating Plaintiff is repeatedly claiming damages (a) for events that did not occur, or (b) far in excess of his statutorily-authorized damages, the sheer number of lawsuits for small damage amounts does not itself warrant a finding that Plaintiff is a vexatious litigant. In other words, while a pattern of alleging only a small number of violations may indicate an intent by Plaintiff to settle rather than litigate lawsuits, such practices – although they may be troublesome, if not disturbing – cannot fairly be deemed "extortion" if the strategy complies with the TCPA and does not involve false or grossly exaggerated allegations.

D. Plaintiff's Purpose in Obtaining the 999 Number.

Finally, Defendant argues Plaintiff obtained the 999 Number for the express purpose of attracting phone calls proscribed by the TCPA. Even if true, Defendant does not point to any provision of the TCPA making such conduct a defense to the alleged violations. The cornerstone of determining whether a litigant is vexatious is frivolity. *Molski*, 500 F.3d at 1059. "The plaintiff's claims must not only be numerous, but also be patently without merit." *Id.* On the record presently before the Court,

Defendant has not established that the litigation attributed to Plaintiff in this District is an undue burden on the Court, baseless, or grossly exaggerated.

III.

CONCLUSION

For these reasons, the Court declines to declare Plaintiff a vexatious litigant in this District. Defendant's motion is denied without prejudice.

IT IS SO ORDERED.

DATED: April 29, 2008

HON. DANA M. SABRAW
United States District Judge